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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 561

KENNETH L. HOSTETLER, EARL ALBERTSON, JUNIOR A. AVERS, WALLACE L. AVERS, HUBERT BALL, JOSEPH B. BLACKER, MARVIN D. CLEM, MILTON RICHARD COCHRAN, THOMAS P. COUNIHAN, CURTIS V. DEVELBISS, MAHLON A. LEATHERMAN, DANIEL R. NOBLE, HARLEY M. SAVILLE, GEORGE A. STAFFORD, GEORGE E. THOMAS and RAYMOND F. ZEGLES, *Petitioners,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION, AND GENERAL GRIEVANCE COMMITTEE, BROTHERHOOD OF RAILROAD TRAINMEN, BALTIMORE & OHIO SYSTEM, *Respondents.*

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE BROTHERHOOD OF RAILROAD TRAINMEN AND GENERAL GRIEVANCE COMMITTEE, BROTHERHOOD OF RAILROAD TRAINMEN, BALTIMORE & OHIO SYSTEM, IN OPPOSITION

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The Petitioners seek the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, of September 21, 1961, denying the Petition for Rehearing following

its judgment of February 23, 1961, which affirmed the decision and Order of the United States District Court for the District of Maryland entered on April 27, 1960, granting Respondents' Motions for Summary Judgment and entering judgment in favor of Respondents for costs.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit is reported in 287 F. 2d 457 and reprinted in Petition [1] 19-25. Its per curiam opinion on the Petition for Rehearing is reported in 294 F. 2d 666 and reprinted in P. 32-34. The opinion of the United States District Court for the District of Maryland, reported in 183 F. Supp. 281, the Order altering and modifying said opinion, and the Memorandum of Court on Motion for an Order Nunc Pro Tunc, is reprinted in Appellants' Appendix in Court of Appeals [2] 96-110, 120-126.

JURISDICTION

The Petitioners seek to invoke the jurisdiction of this Court under Title 28, U. S. C. A., Sec. 1254 (1).

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act, 45 U. S. C. A., Sec. 152 Eleventh (a), (b), (c) are reprinted in P. 17-18. Sec. 153 First (i) and (m) are reprinted in Appellees' Appendix in the Court of Appeals [3] 17-18.

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[1] Petition hereinafter designated as P.

[2] Appellants' Appendix in Court of Appeals designated as A.A.

[3] Appellees' Appendix in Court of Appeals designated as Ae. A.

Those provisions of the Criminal Code 18, U. S. C. A. Sec. 610 which are applicable, are reprinted in Ae. A. 15.

QUESTION PRESENTED

Was the Respondent legally entitled to invoke discharge procedures under a valid union shop agreement between the Baltimore & Ohio Railroad Co. (B&O) and the Brotherhood of Railroad Trainmen (BRT) after the Petitioners voluntarily abandoned BRT membership and joined the United Railroad Operating Crafts (UROC), an unqualified union.[4]

STATEMENT OF THE CASE

Petitioners filed their Complaint against BRT, in Hostetler, in July, 1957 and against B&O and BRT in Decker, in November, 1957[5], claiming damages for alleged tortious and wrongful acts resulting in their discharge *from employment as trainmen with the B&O.* On July 31, 1958 (some 5 to 6 years after abandonment of BRT membership), they amended to include allegations of hasty expulsion, prompt citation and unlawful political activities. Respondents' Motions to Dismiss were overruled. Respondents also filed Motions for Summary Judgment (A. A. 27, 29) and during the course of the last argument in March 1960, Petitioners moved for leave to further Amend, asking an Order requiring the BRT's consent to employment reinstatement. Petitioners' Motion (A. A. 30) was denied for, inter alia, laches and estoppel. Summary Judgment

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[4] Membership in Switchmen's Union of North America and Order of Railway Conductors & Brakemen, alternate *qualified* unions, was available to Petitioners.

[5] Both cases being consolidated by order of the lower court dated April 18, 1959 (A.A. 96).

was granted April 27, 1960 (A. A. 110). Petitioners moved to Alter Judgment and Modify Opinion (A. A. 112-120)—this was granted and judgment was stricken as to eleven of the original forty plaintiffs, because of alleged special facts differentiating their cases (A. A. 112, 120).

The Respondents were granted leave in Hostetler to include the B&O as a Third Party Defendant. The B&O's Motion to Dismiss was granted, with leave to file an Amended Third Party Complaint—the filing being deferred by Stipulation (A. A. 95-96). In Decker, the Petitioners' oral Motion to Dismiss the B&O was granted on May 20, 1959 (A. A. 95), following Agreement of Accord and Satisfaction between B&O and Petitioners' Counsel (A. A. 50-51).

On appeal, the granting of Summary Judgment was affirmed (P. 25). A Petition for Rehearing and/or Other Relief was denied (P. 34).

STATEMENT OF FACTS[6]

There is no genuine dispute as to the following material facts upon which the Second Amended Motions for Summary Judgment were granted, (which was after some 17 or more hearings over a period of three years, involving taking of testimony, consideration of affidavits, transcripts of testimony at the initial and appeal union shop hearings, testimony in *Sampsell, infra,* and numerous memoranda of law, as evidenced by a record on appeal, consisting of some 670 pages, exclusive of voluminous exhibits):

1. The Petitioners were already members or became members of the BRT pursuant to the require-

[6] The Respondents believe this statement of facts material to the consideration of the question presented.

ment of the union shop agreement effective October 1, 1951, which required them "as a condition of continued employment" to become members of the BRT within 60 days and thereafter maintain membership in the BRT or in any one of the labor organizations other than the BRT, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in any of said services (A. A. 98).

2. Upon payment of monthly dues, receipts were issued by the Treasurer (Ae. A. 12).

3. The Petitioners voluntarily stopped paying dues to the BRT in 1952 and 1953 (P. 20). "If the dues of any members are not paid by the tenth of the month, it is the practice to enter 'expelled for non-payment of dues' opposite the name of such member, unless he has applied for and received an extension of time for payment." (A. A. 101).

4. Their non-payment of dues to the BRT resulted in expulsion (A. A. 98, 101).[7]

5. Although some Petitioners testified (union shop appeal hearings, A. A. 74, et seq.) they did not receive any kind of formal notice from the BRT that they were no longer members, there was no claim that notice was customarily sent, or, proof that it was sent to anyone.

6. Alleged BRT political activity played no part in the Petitioners' abandonment of membership in

[7] The BRT Constitution, Secs. 118, 119, provides for expulsion without notice or action if dues are not paid before the first of each month (Ae. A. 5).

the BRT in 1952 and 1953, since it did not then exist (A. A. 2, 4). "Dues were not used for that purpose" (A. A. 105), "no dues were used for an improper purpose while plaintiffs (Petitioners) were members of BRT" (A. A. 105) and the claimed political activity was unknown to them until 1958 (A. A. 48).

7. Petitioners withdrew from and deliberately abandoned their BRT membership (A. A. 97 98, 102) and joined UROC, a rival organization (A. A. 97, 98). "By terminating their membership in Brotherhood and ceasing to pay dues to it, they (Petitioners) made themselves subject to discharge by B&O under the terms of the union shop agreement, unless they could show that UROC was a labor organization which qualified under Section 152 Eleventh (c)" (A. A. 103).

8. None of the Petitioners asked to be carried on the BRT membership rolls without paying dues while the status of UROC was being determined (during which time the Petitioners were organizers and officers of UROC, requiring them as loyal UROC members to get new members).

9. "BRT had always contended that membership in UROC was not a sufficient maintenance of union status to satisfy the statutory requirement and to protect plaintiffs' (Petitioners') employment by B&O" (A. A. 98).

10. The Supreme Court of the United States, in Pennsylvania Railroad Company (& BRT) v. Rychlik, 352 U. S. 480, 77 S. Ct. 421 (1957), held that UROC was not 'national in scope' and membership therein was not compliance with the

maintenance of membership provision of the union shop agreement.

11. Petitioners had membership in the Switchmen's Union of North America or the Order of Railway Conductors & Brakemen (alternate *qualified* unions) available to them at the time they stopped paying BRT dues, and, membership therein would have been compliance with the union shop agreement.

12. Petitioners could have "double-headed", i. e., paid dues to both BRT and a *qualified* alternate union, until UROC's status was determined, which would have prevented discharge; some employees did so (A. A. 70, Ac. A. 8).

13. The BRT, which had the responsibility and duty under the union shop agreement to enforce its terms, cited the Petitioners to the B&O for failure to maintain union membership as required (A. A. 98).

14. The charts (A. A. 35, 37-41), stipulated to be substantially correct (A. A. 34), show that none of the Petitioners were cited until October, 1952, which was after the union shop agreement had been in effect one year or more; that 5 were cited in same month of expulsion, and others, from 1½ to 23½ months after expulsion and ½ of these were cited more than 3 months after expulsion.[8]

15. "The difference in the grace period allowed the several plaintiffs (Petitioners) before citation

[8] The charts referred to do not show that 13 were expelled the day following the last date to which dues were paid, as claimed (P. 8). See Hoffman Affidavit (Ac. A. 1) and Opinion (A. A. 101).

resulted from the fact that the chairman of the local lodge deferred for a few months citation of men whom he thought were on the 'fence' and could be persuaded to return to BRT and pay up their dues" (A. A. 102). "It was not the custom of BRT to cite promptly to B&O every man who was expelled for non-payment of dues, but such citation was customarily postponed until the local officers were satisfied that dues would not be paid" (A. A. 101).

16. After claiming in the Second Amended Complaint that many other dues defaulters, similarly situated, were never cited (A. A. 5), Petitioners' Counsel when challenged, produced 22 names and requested a stipulation that these men had not paid dues and yet were not cited. Of the 22, 13 had been cited (Ae. A. 9-10), 8 were BRT members (Ae. A. 3-4), and one was unaccounted for. (P. 22).

17. "The usual notices (citation) were sent, hearings were demanded by each of the plaintiffs (Petitioners) here and those hearings were held" (A. A. 99). At the initial union shop hearings in 1953, at which Petitioners were represented by counsel or UROC representatives, none claimed BRT membership, hasty expulsion, prompt citation, use of dues for unlawful political activities,[9] or refusal to reinstate or readmit them to membership.[10] (A. A. 99). None asked

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[9] It was not until some 5 to 6 years after their abandonment of BRT membership that they claimed for the first time hasty expulsion, prompt citation and unlawful political activities. Amendment to Complaint filed July, 1958.

[10] For an analysis of the evidence on reinstatement, see Footnote 4 of C.C.A. 4 *per curiam* opinion (P. 22).

to pay their dues or asked to remain BRT members without payment of dues. All relied on UROC membership (A. A. 99). The B&O hearing officer found that they "had failed to comply with the terms of the union shop agreement". (A. A. 109).

18. "In each case it was proved that the employee had voluntarily withdrawn from BRT, that he had ceased paying his dues, and that he had joined UROC." (A. A. 99).

19. At the appeal union shop hearings, held in 1955, at which all of the Petitioners, except Lewis, were represented by counsel, they still made no claim of hasty expulsion, prompt citation or use of dues for unlawful political activity, but relied on membership in UROC (A. A. 99). The B&O hearing officer held the Petitioners to be in violation of the union shop agreement, "In that, on the dates of their initial hearing, they did not hold nor had they acquired membership in the Brotherhood of Railroad Trainmen nor in any one of the labor organizations national in scope." (A. A. 99, 109).

20. Claim is not pressed on alleged discrimination in refusal to reinstate in BRT (Opinion, A. A. 103, P. 21).

21. The decisions in both union shop hearings were deferred by agreement for several years, pending legal decisions in other jurisdictions, and, during this period, Petitioners were retained in their jobs at their regular pay.

22. Petitioners had available the remedy of reinstatement with back pay in the event of unjust dismissal, as provided by Rule 7 (d) of the collective bargaining agreement. The disputes of the

Decker Petitioners and some of Hostetler Petitioners were submitted by the B&O to National Railroad Adjustment Board (Board) (A. A. 99), which has exclusive jurisdiction to award this relief, and whose award is final and binding (Railway Labor Act, Sec. 153 First (m) (Ae. A. 18).

23. The Hostetler Petitioners, in May and June of 1957 (before filing of *Hostetler*), executed covenants not to sue the B&O for $100.00 each. In consideration, the B&O agreed to withdraw those Hostetler cases it had already submitted to the Board, and refrain from submitting the balance (A. A. 99).

24. Decker Petitioners attempted to spurn the Board's jurisdiction by refusing to file answering submissions or appear; however, the B&O submissions fully presented the Petitioners' contentions and the Board sustained the action of the B&O in terminating their employment. (A. A. 99, 107-108)

25. When notified of the intended dates of dismissal, the Petitioners[11] sought an injunction in *Sampsell* v. *B&O and BRT, et al.*[12] to restrain their discharge. They were retained in their jobs at the regular wages (by Stipulation and Injunction) until that proceeding (including appeals) was concluded, after which they were discharged in 1957.

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[11] Except Blacker, Lewis, Thomas and Zegles.

[12] D. C. Md., No. 8804 Civil, unreported (1956). Granting of Motions to Dismiss affirmed, C.C.A. 4, 235 F. 2d 569 (1956), cert. den., 352 U. S. 941, 77 S. Ct. 261 (1956), Pet. for Rehearing den., 352 U. S. 998, 77 S. Ct. 554 (1957).

26. Decker Petitioners originally sued the B&O and BRT. Following Petitioners' Agreement of Accord and Satisfaction with the B&O, they orally moved to dismiss the B&O and their motion was granted (A. A. 95).

27. Counsel for Petitioners stated, before the Motions for Summary Judgment were decided, "that any other testimony would be merely cumulative to that of Hostetler and Leatherman on the issues common to most of the plaintiffs (Petitioners) (A. A. 125), and, agreed the record was closed. (A. A. 126)

ARGUMENT

REASONS FOR DENIAL OF WRIT

I. No conflict exists in the decisions of the Circuit Courts of Appeal.

Both the Union Shop Amendment [1] and the union shop agreement contemplate *continuous* membership by payment of dues to a qualified union. *Alabaugh* v. *B&O*, D. C., Md., 125 F. Supp. 401 (1954), aff. C.C.A. 4, 222 F. 2d 861 (1955), cert. den., 350 U. S. 839, 76 S. Ct. 77 (1955); *Rychlik* v. *Pennsylvania Railroad Company* (& *BRT*), D. C. N. Y., 128 F. Supp. 449 (1955), rev. C.C.A. 2, 229 F. 2d 171 (1956), rev. 352 U. S. 480, 77 S. Ct. 421 (1957). It was as an answer to the question "* * * whether those who enjoy the fruits and benefits of unions should make a fair contribution to the support of the unions" that the union shop provision of the Railway Labor Act was enacted. See *Railway Employees Department* v. *Hanson*, 351 U. S. 225, 76 S. Ct. 714 (1956); also, *International Associa-*

[1] 45 U. S. C. A., Sec. 152 Eleventh, approved January 10, 1951, Public Law 914, 81st Congress 2nd Session, 64 Stat. 1238, Ch. 1220 (Ac. A. 16-17).

tion of Machinists v. *Street*, 367 U. S. 740, 81 S. Ct. 1784 (1961).

The Petitioners ceased paying dues to the BRT and failed to acquire alternative membership in other qualified unions, "conterminously",[14] although available to them. They were then cited[15] by the BRT as being

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[14] This was a breach of the union shop agreement (*McNamar* v. *B&O and BRT*, D. C. Ind., 158 F. Supp. 835 (1957), aff. C.C.A. 7, 254 F. 2d 717 (1958); *Alabaugh* v. *B&O supra*) which "permitted the BRT to exercise its rights under the terms of the Union Shop Agreement, *i.e.*, to notify the carrier of his (Petitioners) failure to comply with the terms of the Agreement and to insist that he (Petitioners) was no longer entitled to continue in employment." *McNamar* v. *B&O and BRT*, C.C.A. 7, *supra*; (See also *Sams* v. *Brotherhood of Railway and Steamship Clerks*, D. C., So. Car., 166 F. Supp. 49 (1956), aff. C.C.A. 4, 233 F. 2d 263 (1956); *Latham* v. *B&O Def. and BRT, Third Party Def.*, D. C. N. Y., Civil Action 7050 unreported, (1958), aff., C.C.A. 2, 274 F. 2d 506 (1960); *Shiels* v. *B&O*, D. C. Ind., 154 F. Supp. 917 (1957), aff., C.C.A. 7, 254 F. 2d 863 (1958), cert. den., 358 U. S. 846, 79 S. Ct. 71 (1958), Pet. for Rehearing den., 358 U. S. 896, 79 S. Ct. 155 (1958); *Hasler* v. *BRT*, D. C., Ohio, Civil Action 4953 unreported (1961).

[15] In the Supplemental Affidavit of B. G. Herbig (Examiner, Personnel Department, B&O) filed in support of B&O's Application for Judgment, he states:

> "1. The examination of the files covering union shop violation charges against trainmen on the B&O covered approximately 1800 such files.
>
> 2. Those files show that the Brotherhood was strictly enforcing the union shop obligation of dues payment. A vast majority of the 1800 violations charges concerned individuals who were either ordinary non-members or simple dues-delinquents, rather than individuals who were attempting to transfer to an exclusive membership in some rival new labor union, such as the United Railroad Operating Crafts (hereafter 'U.R.O.C.'). In other words, most of the individuals concerned in these charges had simply neglected to make prompt payment of their dues as required by the laws of the Brotherhood of Railroad Trainmen."

in non-compliance with the union shop agreement for non-payment of dues. Upon request, they had hearings before the B&O trainmaster, and on appeal, after adverse decisions, before Mr. B. G. Herbig, Examiner, Personnel Department, B & O, who also found them in non-compliance. They were subsequently discharged.

The facts, as related above, are identical with those involved in *McNamar* v. *B&O and BRT*, C.C.A. 7, *supra*; *Shiels* v. *B&O*, C.C.A. 7, (cert. den.), *supra*; *Latham* v. *B&O, Defendant and BRT, Third Party Defendant*, C.C.A. 2, *supra* (discrimination also being alleged in the three cases), where the Second and Seventh Circuit Courts of Appeal affirmed the *granting of Summary Judgment* to the Defendants by their District Courts.

The National Labor Relations Board (Labor Board) cases cited by the Petitioners, were actions under the National Labor Relations Act as amended,[*] where "employees under a union shop contract governed by that Act must join and maintain membership in the union designated as the bargaining representative or suffer discharge" (*Pennsylvania Railroad Company (& BRT)* v. *Rychlik, supra*), as distinguished from the Railway Labor Act where employees could satisfy the union shop requirement by holding membership in any other alternate qualified labor organization (two of which were available to Petitioners). They are clearly distinguishable on the facts.

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[*] 61 Stat. 136, 29 U. S. C. A., Sec. 158 *et seq.* Employees under a union shop agreement governed by this Act may lodge charges with the Labor Board which investigates the charges, issues complaints, etc.; its final order is subject to judicial review. Under the Railway Labor Act, two union shop hearings are held by the railroad officials and then *either* party may refer it to the Board for determination, whose award shall be final and binding upon *both* parties (Ac. A. 17, 18).

The Petitioners also rely upon *Cunningham* v. *Erie Railroad Company*, C.C.A. 2, 266 F. 2d 411 (1959), in support of their contention that the decision of the Fourth Circuit is contrary to the view prevailing in other Circuits. They say (P. 10), "* * * substantial discrimination or hostile motivation in the invocation of the union security contract provisions was alleged or shown and * * * the court held that these facts, if found, would justify relief against the union bargaining representative * * *". This was the only cited Circuit Court case in which a violation of the Railway Labor Act was alleged. There, Cunningham refused to pay his union dues "until some action was taken regarding * * * seniority rights", which the Court interpreted as charging in substance that "he was wrongfully deprived of his seniority rights and that because he had the timerity to stand up for his rights and refused to pay his union dues he was deprived of his union membership and discharged from the employment of the railroad for a reason other than the non-payment of union dues." Reversing the judgment of the District Court dismissing the complaint, Judge Medina said (416, 417):

> "As we have already indicated, in order to establish a breach by the union of its duty to represent the employees fairly, as the bargaining representative of the employees sanctioned by statute, it is not enough to prove that the union was wrong in demanding Cunningham's dismissal. This duty was no more than to forebear from 'hostile discrimination'. The arbitrariness shown must be of the bad faith kind. As Justice Stone suggested in Steele, 323 U. S. at page 203, 65 S. Ct. 226, it is not violative of federal law that the union not satisfy all employees or that it improperly balance the rights and obligations of the various groups

it represents. Something akin to factual malice is necessary * * *."

Cunningham was decided by the Second Circuit on May 4, 1959. On January 15, 1960, the same Court decided *Latham* where the facts were the same as those of the instant case. The appellants there, in support of their contention, relied upon the Court's decision in *Cunningham*. In disposing of this, Judge Medina said (510):

"* * * There we found there was a triable issue, whether Cunningham's union membership had or had not been terminated for a 'reason other than the failure of the employee to tender the periodic dues.' As this issue had not been resolved in the finding made in the District Court after a non-jury trial, we remanded the case for retrial. We are at a loss to perceive how this ruling in Cunningham helps appellants. There could not possibly have been any discrimination connected with their voluntary act of resigning from the Brotherhood in order to join UROC."

Continuing, he said (511):

"The comment by Chief Judge Swygert in McNamar, which incidentally was an action against both the railroad and the Brotherhood, 153 F. Supp. at page 839, and quoted in the reasoning of the District Court approved by the Seventh Circuit in Shiels, is equally applicable to appellants in the case before us. He said:

'Once it becomes apparent that the plaintiff initially, voluntarily and deliberately breached the Union Shop Agreement, the motives which prompted the defendants to act within their contractual and statutory rights are immaterial.'

"This is a far cry from Cunningham. The plain fact of the matter is that there never was any

> *genuine issue* in the case (Latham) other than the dispute concerning the status of UROC as a union 'national in scope'. When Rychlik was decided by the Supreme Court this issue was disposed of with finality and appellants' case collapsed." (emphasis ours).

II. There is no conflict in this decision with any of the Supreme Court.

The requirement that membership be continuous by payment of dues to a qualified labor organization, was within the purview of the Union Shop Amendment to the Railway Labor Act. *Rychlik* v. *Pennsylvania Railroad Company (& BRT), supra.* It is not violative of the First or Fifth Amendments. *Railway Employees Department* v. *Hanson, supra.* Being legally sanctioned, therefore, the action of the bargaining representative in invoking the discharge procedures of the union shop agreement for non-compliance with this requirement, *i.e.*, failure to acquire membership in an available qualified alternate labor organization at the time of abandonment of BRT membership, does not give rise to a federal cause of action.

> "* * * Since UROC was not so qualified, respondent had no federal right to join it in lieu of the authorized bargaining representative under the union shop provision of the Railroad-Brotherhood contract. His discharge by the petitioners therefore did not give rise to a federal cause of action." *Pennsylvania Railroad Company (& BRT)* v. *Rychlik, supra,* p. 485.

Petitioners argue that the Circuit Court misapplied this Court's decision in *Rychlik* which they say (P. 12, 13) does not deal with the problem of discrimination and "is patently inapplicable". The Fourth Circuit (as did Judge Thomsen) found no "arbitrary" or

"unlawful" discrimination (P. 22, 23), and, in applying *Rychlik*, said (P. 23):

> "* * * In the absence of discriminatory treatment by the Union, Pennsylvania R. Co. v. Rychlik, 352 U. S. 480 (1952) [1957], appears to preclude such relief." (reinstatement in their employment with full seniority)

It is obvious the statement "appears to preclude such relief" is an adoption of this Court's ruling "no federal cause of action existed" (P. 25), even though, as stated by Mr. Justice Harlan in Rychlik (p. 482):

> "* * * At that time he resigned from the Brotherhood and joined United Railroad Operating Crafts (UROC), a competing union which respondent believed in good faith to be 'national in scope' and 'organized in accordance with' the Act, and therefore available for alternative membership * * *."

In the instant case, Judge Thomsen, with respect to the "hard feelings on the part of BRT officials against men who joined UROC, especially the organizers and leaders of the movement", faster citation of some men than others, and, "distinctions were made on the basis of UROC activity" as whether or not to expel, cite or readmit the men, said (A. A. 124):

> "* * * Those distinctions might be called discrimination in other contexts, but if the legal principles quoted, discussed and adopted by this Court are sound, those distinctions do not amount to actionable discrimination in this case. * * *"

And, as to faster expulsion of some of the Petitioners than other men, he said (A. A. 125):

> "* * * that might be called discrimination, for certain purposes. But it is not actionable discrim-

> ination under the legal principles which I have found to be applicable in this case. * * *"

As to more prompt citation of some then others, the Circuit Court, in its *per curiam* opinion said (P. 22):

> "* * * BRT's reason for this was that, as to some, it had greater hopes of persuading them to rejoin. This would seem to furnish a reasonable basis for distinctions in treatment and not to constitute the arbitrary discrimination forbidden by law."

And, with reference to discrimination in citation and reinstatement, it said (P. 22):

> "* * * We have carefully reviewed the record and find that, when given the opportunity by the District Court, the appellants were unable to present any significant evidence of discriminatory treatment. * * *"

Judge Bryan (concurring in part and dissenting in part and on whose opinion Petitioners rely), in concurring with the District Court's opinion that the differentiation in haste and promptness in expulsion and citation did not amount to actionable discrimination, said (P. 26):

> "* * * I hold this view, too, because the plaintiffs purposefully left BRT and intended to end their membership. The union merely took them at their word, which was hardly a discrimination. For the same reason the Brotherhood was warranted in swiftly citing them to the Railroad and questioning their eligibility for continued employment."

Rychlik was discharged in January of 1955 and shortly thereafter filed his Complaint, seeking, *inter alia*, a permanent injunction for reinstatement to employment. Upon hearing on a show cause order in

February of 1955, the relief was denied, 128 F. Supp. 449. In the instant case, it was not until March of 1960, nearly 3 years after the filing of their original Complaints, that Petitioners "at close of final argument with the current running against them" (A. A. 108) asked leave to further amend their Complaint to seek an alternative "equitable relief requiring the BRT to consent to the reinstatement of plaintiffs with their old seniority". (A. A. 109). The BRT interposed objections including laches and estoppel. Judge Thomsen, in denying Petitioners' motion, held (A. A. 109, 110), that the relief prayed was within the exclusive jurisdiction of the Board, *Sampsell* was res adjudicata on the question of jurisdiction, estoppel of Decker Petitioners by Board awards; also,

> "Moreover, the relief sought by the proposed amendment is barred by laches and estoppel. The plaintiffs were cited in 1952 and 1953, were held to be in violation of the Union Shop Agreement by the B&O hearing officer in 1954 and 1955, were again held by the B&O appeals hearing officer, in early 1957, after the decisions in Alabaugh and Sampsell, to have been in violation of the Union Shop Agreement at the time of their initial hearings, and were thereafter discharged from their employment with the B&O in April, May and June of 1957. In March, 1960, they pray, for the first time, restoration to their employment with seniority. No such claim was made in the Complaints filed in Hostetler on July 12, 1957, and in Decker on November 8, 1957, nor in the Hostetler Amendment to Complaint filed on July 31, 1958, nor in the Decker Amendment to Complaint and Second Amended Complaint filed on June 15, 1959. Plaintiffs at any time after their discharge had the right to be hired as new employees and be placed at the bottom of the seniority roster."

Reinstatement to employment is a relief within the exclusive jurisdiction of the Board. If an employee, discharged for a union shop violation, were permitted to "run into court" about it by bringing an action solely against his union, claiming that rights under a statute are involved, then, "* * * it would breed endless confusion and virtually nullify the administrative remedy which Congress has been at pains to provide. * * *" Alabaugh v. B&O, C.C.A. 4, supra.

Rychlik (as do the Petitioners), claimed that after resignation from the BRT, the BRT refused to reinstate him. Chief Judge Knight, of the District Court, in disposing of this, said (455):

> "* * * There appears to be no grounds for the equitable intervention of this Court for such refusal. A like question was discussed by the court in Alabaugh v. Baltimore & Ohio Railroad Co., supra, wherein the court, 125 F. Supp. at page 407, said:
>
> > 'When plaintiffs applied for reinstatement in Brotherhood, it was within the discretion of that organization whether or not they should be reinstated. There is no provision in the statute or in the agreement with B&O which requires such action.
> >
> > 'The courts cannot require individuals or associations to be forgiving or generous nor prevent the operation of the rule that 'they that take the sword shall perish with the sword' unless some constitutional or other legal right or immunity is threatened. Nor does the action of Brotherhood in reinstating some members who had been less active in UROC create any right in plaintiffs to secure an order for reinstatement in this case.

> 'So far as Brotherhood's refusal to reinstate plaintiffs affects their discharge by B&O, it is clearly a dispute similar to those which the courts have held to be within the primary jurisdiction of the Adjustment Board.' "

Petitioners do not argue a conflict of opinion with *Street*, supra, or the applicability of it, but raise a question of whether they are entitled to similar relief (P. 6). The reasons for denying them relief are fully stated in the per curiam opinion of the Circuit Court on the Petition for Rehearing (P. 32-34). Further elaboration or repetition would serve no useful purpose.

Neither *Steele* v. *Louisville & N. R. Company*, 323 U. S. 192, 65 S. Ct. 226 (1944) nor *Conley* v. *Gibson*, 355 U. S. 41, 78 S. Ct. 99 (1957) (both negro discrimination cases), nor *Radio Officers' Union, etc.* v. *National L. R. Bd.*,[17] 347 U. S. 17, 74 S. Ct. 323 (1954) cited by the Petitioners, involved voluntary abandonment of membership in a qualified labor organization and a failure to simultaneously acquire membership in a qualified alternate union, as in the instant case.

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[17] Consists of three cases. *Teamsters* involved reduced seniority for non-payment of dues, as contained in union by-laws (union security provisions ineffective because of lack of authorization then required by Act); seniority list containing both union and non-union members; Labor Board found unfair labor practice, ordered withdrawal of request for reduction in seniority, offer of restoration to former status, etc.; C.C.A. 8 refused to enforce order; this Court reversed. *Radio Officers* involved refusal of union to give clearance; Labor Board, holding that employee was in good standing in union at all material times, found unfair labor practice and ordered withdrawal of objection to employment, offer of employment, etc.; C.C.A. 2 granted petition for enforcement of order; this Court affirmed. *Gaynor* involved retroactive wage increase and vacation payments only to union members; Labor Board, finding unfair labor practice, ordered non-union employees similarly situated to be made whole; C.C.A. 2 granted enforcement of order; this Court affirmed.

III. Petitioners agreed to have the basic legal questions decided on summary judgment.

The Honorable Judge Thomsen, in his opinion, stated (A. A. 123):

> "* * * At the time the motions for summary judgment were argued, it was my clear and distinct understanding that counsel for plaintiffs, as well as counsel for defendants, thought it was desirable to have the basic legal questions common to all of the cases disposed of on motion for summary judgment, for the following reasons * * *".

The Petitioners were not desirous of presenting any additional evidence on the issues involved.[18] "Any other testimony would be merely cumulative". (A. A. 125). On March 17, 1960, the following colloquy occurred (A. A. 126):

> "The Court: I have been asked to hear oral argument. There has been no oral argument since the last briefs were filed.
>
> "I understand however before we start that both sides agree that they have filed in court all papers, all exhibits and have taken all testimony which they feel necessary to be taken on the various motions which are now pending before the Court including the motion for summary judgment. Is that correct?
> "Mr. Brune: Yes.
> "Mr. Savage: Yes.
> "The Court: Then I understand the record is closed on these motions, and I will be glad to hear from both sides."

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[18] Except "to bring out any special facts involving Mr. Legeer and possibly one or two others" (A. A. 125). After summary judgment, however, Petitioners filed Motion to Alter or Amend Judgment as to eleven plaintiffs, alleging special facts differentiating their cases from the others (A. A. 112-115). The Motion was conditionally granted, upon filing of affidavits to show that their cases presented special questions (A. A. 120).

CONCLUSION

From filing of the Complaints in July and November of 1957 until granting of Summary Judgment in April of 1960, there were over 17 separate hearings. Petitioners, who claimed hostile and arbitrary discrimination, were given a wide latitude to present proof; yet "were unable to present any significant evidence of discriminatory treatment" and "could offer no substantial evidence of unlawful discrimination" (P. 22, 23), leaving no genuine issue as to any of the material facts. Petitioners have never claimed they were precluded from offering additional evidence.

They claim they are entitled to a plenary trial before a jury, based on the evidence, which both the trial and appellate court found was not actionable discrimination. It would seem futile to take "several months" to present "cumulative evidence" not constituting actionable discrimination and furnishing only the basis for a directed verdict.

Street limits relief to recovery of that part of dues used for unlawful political activities or injunction to restrain such use, to those who protest. "Our plaintiffs (Petitioners) did not show that they ever registered any protest" (P. 33).

For the aforegoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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